No. 12018

United States
Court of Appeals
for the Ninth Circuit

OWEN J. McNALLY,

Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a corporation, MORRISON-KNUDSEN CO., a corporation, and UNITED STATES OF AMERICA,

Appellees.

Transcript of Record

Appeal from the District Court of the United States for the Western District of Washington, Northern Division

Typo Press, 398 Pacific, San Francisco 10-8-48—60

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF COUNSEL

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1912 Smith Tower,
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Seattle, Washington. [1*]
Attorneys for Appellee
United States of America,

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the Western District of Washington, Northern Division

Civil Action No. 1628

OWEN J. McNALLY,

Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION COMPANY, a corporation, and MORRISON-KNUDSEN COMPANY, a corporation,

Defendants.

COMPLAINT

I.

Plaintiff brings this action to recover from the defendants unpaid overtime compensation, and an additional equal amount of liquidated damages on his own behalf; that he also brings this action on behalf of other employees, and former employees similarly situated, who may hereafter join in this action, all pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938, (Pub. No. 728, 75th Congress; 52 Stat. 1060), hereinafter referred to as the Act.

II.

Jurisdiction is conferred on the Court by Section 14 (8), 28 U.S.C.A. (Judicial Code) 24 giving the District Court original jurisdiction "of all suits and proceedings arising under any law regulating commerce," without regard to the citizenship of the

parties, or the value or sum, in controversy, and by Section 16 (b) of the Act.

III.

That the defendant S. Birch & Sons Construction Company is a Montana corporation, doing business under said name and style, and Morrison-Knudsen Company, Inc., is a corporation organized and existing under the laws of the State of Delaware, and qualified [2] to do business in the State of Washington; and, that said defendants under the name and style of S. Birch & Sons Construction Company and Morrison-Knudsen Company, Inc., were, and now are, engaged in the purchasing and using, selling and furnishing of materials, equipment and supplies in interstate commerce for the building of camps and bases in the Territory of Alaska; that the material, equipment and supplies were purchased at various places, both within and without the Territory of Alaska and the State of Washington, and shipped in interstate commerce to Alaska for use; that substantially all of said materials, equipment and supplies were produced for interstate commerce, and have been purchased, sold, offered for transportation, transported, shipped or delivered in interstate commerce from various points within and without the State of Washington and other States to Alaska and from Alaska to other States.

IV.

That during the work weeks beginning 1943 to this date, defendants have employed a large number of men and women in the buying, selling and

transporting of said materials, equipment and supplies in Alaska, doing clerical, office, bookkeeping and accounting work necessary for the buying, selling and transporting of said materials, equipment and supplies, and in keeping payrolls and other records of other employees located in the Territory of Alaska, all in interstate commerce; that during said period, the defendants, who are engaged in the buying, selling and transporting of goods in interstate commerce, or engaged in operations necessary to the production of goods for interstate commerce within the meaning of the Act, employed the plaintiff and other employees similarly situated, who may hereafter join in this suit, to perform duties constituting an essential part of the handling and the buying, selling and transporting in [3] interstate commerce of defendant's goods without compensating them for overtime as provided by said Act; that the goods purchased, sold and transported by such employees, during such period, have been produced for interstate commerce and have been sold, offered for transportation, transported, shipped or delivered in interstate commerce from various points within the various States of the United States to Alaska, and to and from the scene of operations where the plaintiff and employees were employed.

V.

That in such business the defendants have employed the plaintiff, in the various duties and for the time described in their various causes of action hereinafter alleged; and, that the functions per-

formed by the plaintiff, are an essential part of the handling, selling and transporting of defendants' goods, and they were transported and delivered in interstate commerce; and, that the performance of such duties constitute engaging in commerce within the meaning of the Act.

VI.

That during such period, defendants employed plaintiff and other employees similarly situated, in the buying, selling, handling and transporting, or in occupations necessary to the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act, for work weeks longer than the applicable maximum number of hours under Section 7 of the Act, and failed and refused to compensate him for such employment in excess of such applicable maximum hours in such work week, at rates not less than one and one-half times the regular rates at which they were employed; that the employment of the plaintiff and former employees, and others similarly situated for work weeks in excess of the applicable maximum hours under Section 7 of the Act, without compensating them for such excess hours at [4] rates not less than one and one-half times the regular hourly rates at which they were, or are, employed, was in violation of Section 7 of the Act.

VII.

That during periods alleged defendants employed the plaintiff, and other employees, and former employees hereafter to be named, in its said operations, as aforesaid, in excess of forty hours during

each work week and paid wages to the plaintiff and other employees, on the basis of the straight hourly rate for forty-eight hours per week; that under the provisions of Section 7 of the Act, plaintiff and former employees should have received an additional one-half time for all overtime hours worked between forty and forty-eight hours, and time and one-half for all overtime hours worked in excess of forty-eight hours per week, exclusive of the 7th day.

VIII.

That from September 24, 1944, to and including October 13, 1945, the defendants employed the plaintiff as storekeeper, whose duties consisted of working in the warehouse office, typing equipment inspection reports, material requisitions, letters relative to baggage and shipment, checking and labeling baggage and records, typing final reports, packing and shipping records, repairing and typing receiving reports, checking shipments, receiving shipments, preparing and typing manifests, typing, receiving and inspecting reports, checking other employees' baggage, typing miscellaneous letters addressed to Continental United States, all being connected with the interstate operations and transactions as alleged in Paragraph II, III, IV, V, VI and VII, inclusive, and who is also engaged in an occupation necessary to the movement of goods in interstate commerce, and is engaged in the construction of an instrumentality of interstate commerce which had theretofore [5] been used, and was being used, in interstate commerce;

and, that as such employee the plaintiff was engaged in interstate commerce or in the production of goods for interstate commerce, within the meaning of the Fair Labor Standards Act of 1938; and, that he worked regularly from September 24, 1944, to and including October 13, 1945, and by reason thereof the defendants became indebted to the plaintiff for a total of three hundred forty-four overtime hours at the one-half time rate, and five hundred sixteen overtime hours at the time and one-half rate, as alleged in Paragraph VII, but that said defendants, the employers, compensated him for his work at a rate which was less than one and one-half times his regular hourly rate at which he was employed, and by reason thereof, the defendants became indebted to the said Owen McNally, in the sum of fourteen hundred seventy-five dollars and eighty-eight cents ($1475.88), no part of which has been paid; that the Fair Labor Standards Act of 1938 further provides in Section 16 (b) thereof, that any employer who so violates the provisions of said Act, shall be liable to any employee affected in the amount of the said unpaid overtime compensation, and in an additional equal amount as liquidated damages, and shall be liable for a reasonable attorney's fee and costs of said action; that the sum of $750.00 is a reasonable attorney's fee on said claimant's cause of action.

Wherefore, Plaintiff prays for judgment against the defendants as follows:

1. In the amount of $2,951.76 for the unpaid overtime compensation and liquidated damages, to-

gether with $750.00 as a reasonable attorney's fee.

2. For his costs and disbursements herein to be taxed.

OSCAR A. ZABEL,
FREDERICK PAUL,
Attorneys for Plaintiff.

[Endorsed]: Filed [Illegible].

[Title of District Court and Cause.]

ANSWER AND AFFIRMATIVE DEFENSES

Come now the defendants, S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, a corporation, and for answer to the Complaint of the plaintiff herein, admit, deny and allege as follows:

I.

For answer to Paragraph I of the plaintiff's Complaint, admit that the plaintiff brings this action to recover from the defendants claimed unpaid overtime compensation, and an additional equal amount of liquidated damages on his own behalf, pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938 (Pub. No. 728, 75th Congress; 52 Stat. 1060); and deny each and every other allegation in said paragraph contained.

II.

Deny each and every allegation as contained in Paragraph II of the plaintiff's Complaint, and the whole of said Paragraph.

III.

For answer to Paragraph III of the plaintiff's Complaint, admit that the defendant, S. Birch & Sons [7] Construction Company, is a Montana corporation, doing business under said name and style, and Morrison-Knudsen Company, Inc., is a corporation organized and existing under the laws of the State of Delaware and qualified to do business in the State of Washington; and deny each and every other allegation in said paragraph contained not herein expressly admitted.

IV.

Deny each and every allegation as contained in Paragraph IV of the plaintiff's Complaint, and the whole of said paragraph.

V.

For answer to Paragraph V of the plaintiff's Complaint, admit that the defendants have employed the plaintiff at various times and in various duties; and deny each and every other allegation in said paragraph contained not herein expressly admitted.

VI.

Deny each and every allegation as contained in Paragraph VI of the plaintiff's Complaint, and the whole of said paragraph.

VII.

Deny each and every allegation as contained in Paragraph VII of the plaintiff's Complaint, and the whole of said paragraph.

VIII.

Deny each and every allegation as contained in

Paragraph VIII of the plaintiff's Complaint, and the whole of said paragraph.

And by way of further answer to the plaintiff's Complaint, and as an affirmative defense thereto, these [8] answering defendants allege:

I.

That the plaintiff herein, during his employment by these answering defendants, was not engaged in commerce or in the production of goods for commerce, and hence was not subject to the provisions of the Fair Labor Standards Act of 1938, as Amended.

II.

That during the entire time of the employment of the plaintiff by the defendants, as referred to in the plaintiff's Complaint herein, said plaintiff was employed by the defendants in a bona fide administrative capacity, and hence the plaintiff was not subject to and was covered by the exemptions as contained within the Fair Labor Standards Act of 1938, as Amended.

III.

That in accordance with the terms and provisions of the written Employment Agreements between plaintiff and these answering defendants, copies of which are attached hereto as Exhibits "A" and "B", and are by this reference thereto incorporated into and made a part of this paragraph the same as though set forth in full herein, the "base compensation" rate of pay of the plaintiff covered all hours worked in the first six (6) days of a work-week, and accordingly the total

number of hours worked in the first six (6) days of each week should be used in computing the hourly wage rate for such work under the Fair Labor Standards Act of 1938, as Amended.

IV.

That in accordance with the terms and provisions of the written Employment Agreements between the plaintiff [9] and these answering defendants, copies of which are attached hereto as Exhibits "A" and "B", and are by this reference thereto incorporated into and made a part of this paragraph the same as though set forth in full herein, all Class "B" employees, of which the plaintiff was one, were paid double-time for all hours worked on the seventh (7th) day of each work-week, and that these answering defendants are entitled to an offset in credit against any overtime compensation allowed the plaintiff under the Fair Labor Standards Act of 1938, as Amended, of one fourth (¼th) of the total double-time payments.

Wherefore, having fully answered the Complaint of the plaintiff herein, these answering defendants pray that said action may be dismissed with prejudice, and that they may have and recover their costs herein.

ALLEN, HILEN, FROUDE & DeGARMO.

By /s/ GERALD DeGARMO,

Attorneys for Defendants, S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, a corporation.

(Acknowledgment of Service.) [10]

EXHIBIT "A"

S. Birch & Sons Construction Co. and Morrison-Knudsen Company, Inc.

Contracts W-45-108-eng-500, 501, 502
Cost-Plus-A-Fixed-Fee

CONTRACTORS' UNIFORM CONTRACT OF EMPLOYMENT APPLYING TO

Non-Manual

Employees of Fixed Fee Contractors Employed in the Continental United States or in Alaska for Work in Alaska.

This Agreement, made this 24th day of September, 1944, by and between S. Birch & Sons Construction Co. and Morrison Knudsen Company, Inc., of Seattle, State of Washington, the Contractors under Contracts No. W45-108-eng-500, 501, 502 with the War Department requiring among other things, performance of certain work in Alaska, hereinafter called the "Contractor," and Owen J. McNally, of New York City, State of New York, who has applied to the Contractor for employment under said contract, hereinafter called the "Employee."

Witnesseth That the parties have and do hereby agree as follows:

Article 1. Assignment of Work.

Effective on the date hereof and subject to all the terms and conditions of this Agreement, the Em-

ployee hereby accepts employment by the Contractor as Storekeeper for service as such in connection with said contract. The Employee's initial assignment is to work in that capacity at Aleutian Islands Area. The Employee agrees that his services may be used at any other location in Alaska designated by the Contractor. In the event the Contractor may require the Employee to render service in any other capacity than that designated above, either for the Contractor or for others, the Employee shall perform the work assigned to the full extent of his ability. The Employee warrants that all the statements made in his application for employment are true.

Article 2. Compensation.

a. Base Compensation. The Employee is employed at a "base compensation" rate of $70.00 per week (United States currency) payable by check or currency as the Contractor may desire. Unless otherwise directed by the Employee in writing, subject to the approval of the Contractor, all compensation payments shall be made to the Employee at the site of the work. Base compensation shall commence on the above date. Compensation shall be subject to deduction of any indebtedness owed to the Contractor, for Social Security Tax and other deductions required by the law, if applicable, and shall be subject to such deductions as may be provided by regulations of the Contractor and approved by the Contracting Officer under the contract described above, hereinafter called the "Contracting Officer." If the Contractor requires

the Employee to render service in any other capacity than that designated in Article 1, the base compensation to be paid the Employee will be that stipulated in this Section a, except that if such work is in a higher compensation classification, the Employee shall be paid such higher compensation during the time he is working at such other work. If the Employee is not qualified to perform the work stipulated in Article 1, the parties hereto may agree upon his assignment to work carrying a lower base compensation classification and that he is to be paid the base compensation carried by the lower classification, in which event this Agreement will be modified in writing accordingly.

b. Subsistence. Employees shall be furnished subsistence and quarters at the place of work assignment at a charge not to exceed $1.50 per day, payroll deductions for which are hereby authorized, except for those employees whose base compensation includes subsistence and quarters.

c. Payments. Accrued compensation payments will generally be made weekly to the Employee. For purposes of computing the amount of base compensation earned for days consumed in travel from the point of hire to destination for work assignment and for days during which the Employee may be entitled by the provisions of this Agreement to base compensation after termination of employment, a fractional day shall be considered a full day. Compensation earned or to accrue may not be assigned, transferred, or encumbered, in whole or in part, without the prior written consent of the Contractor.

d. Return Transportation Fund. In consideration of the Contractor's agreeing to pay the transportation and traveling expenses of the Employee to "return destination" solely at the Contractor's expense, except in the event the employment herein provided for is "terminated for cause," the Employee agrees to deposit with the Contractor 25% of each compensation payment earned after arrival at the place of work assignment until the "return transportation fund" totals $120.00, and hereby appoints the Contractor as his special representative and agent for the purpose of depositing 25% of each compensation payment in said fund until it reaches said amount. In the event and only in the event that the employment herein provided for is terminated for cause as provided in Article 3 hereof, the fund thus created shall be used for the purpose of paying the transportation and traveling expenses of the Employee to the return destination and any unexpended balance not used for that purpose shall be promptly returned to the Employee. If this agreement is not terminated for cause, all of such fund shall be included in the final compensation payment. If this agreement is assigned to any other employer in the Alaskan Area as provided in Article 12, the return transportation fund created pursuant to the above will be turned over to the new employer to be deposited in a special account and used as provided above.

Article 3. Term of Employment.

a. The Employee agrees to be employed under this Agreement for a period commencing on the

date hereof and ending upon termination of the employment by the Contractor or the Employee, all in accordance with the terms and conditions of this Agreement. After one year's continuous employment, the Employee may terminate the employment by giving to the Contractor a written notice specifying the termination date, which date shall not be less than fifteen days after the date of the notice. Upon such termination by the Employee, the Contractor shall pay base compensation until the Employee arrives at the return destination as specified or allowed by the Contractor pursuant to Article 4, or fifteen days after the effective date of the termination, whichever shall be the later. The Contractor may without cause terminate the employment at any time after the date hereof by giving the Employee a written notice specifying the termination date, which date may be the same date as the date of notice. Upon such termination by the Contractor, the Contractor shall pay base compensation until the day the Employee arrives at the return destination or for fifteen days after the effective date of termination, whichever shall be the later. Upon such termination by either the Employee or the Contractor, the Employee shall continue to work until the effective date of the termination.

b. The Contractor may for cause terminate the employment instanter by delivering a notice in writing to the Employee specifying the date of termination which may be the date of the notice.

In the event of such termination for cause, no base compensation and no subsistence shall be paid beyond the termination date or the last day worked, whichever shall be the earlier. Termination by the Contractor for cause shall be when the employment is terminated for reason of any fault or dereliction of duty by the Employee, which causes shall include but not be limited to: (1), incompetence; (2), venereal disease incapacitating him for the performance of his work; (3), inordinate use of intoxicating liquors or drugs incapacitating him for the performance of his work; (4), other acts of misconduct. The Agreement shall not be deemed to have been terminated for cause (1) in the event the employment is terminated for reason of the Employee's inability regularly to perform his duties due to illness or physical incapacity not due to the Employee's own fault and certified by a qualified medical doctor designated or approved by the Contractor; or, (2) in the event that the Employee terminates the employment voluntarily after one year's continuous service and after having given the notice required in Section a. of this Article; or, (3) in the event that the Employee is officially required to resign his employment and return to the United States for induction into the armed forces of the United States. In the event that the Employee fails to report for duty and render service without good cause and the Contractor does not elect to terminate the employment therefor, the Contractor shall deduct from his pay a pro

rata part of the base compensation to cover such loss of time and the Employee shall also be denied, pro rata, the subsistence amount applicable to the same period.

Article 4. Transportation and Travel Expense.

a. Transportation and Travel Expense to and from Destination from work assignment. Subject to the right in the Contractor, in the event this Agreement is terminated for cause, to use moneys in the return transportation fund created pursuant to Section d. of Article 2 hereof, to defray transportation and travel expenses of the Employee to return destination, the Contractor shall at his election either furnish or reimburse the Employee for the actual, reasonable, and necessary transportation and travel expenses of the Employee in traveling from New York, New York to the place of work assignment and in traveling to return destination at the termination of employment. The return destination shall be Employee's initial point of hire as indicated in the introductory paragraph of this agreement, or such other point of equivalent or less travel time, distance, and cost as the Employee may elect, subject to the approval of the Contractor. In the event of termination for cause, the Employee hereby waives all rights to the moneys in said return transportation fund used by the Contractor for the purpose of defraying the expenses of transportation and traveling expenses to return destination. Such transportation expenses shall include actual, reasonable, and necessary expense in transporting personal luggage and other property

of the Employee consisting of personal clothing and necessary effects, such as toilet articles. The Contractor will not bear the expense of transporting household goods or the dependents of the Employee, and it is expressly understood and agreed that due to the war emergency and conditions created thereby none of the Employee's family shall accompany the Employee to the destination for work assignment or go thereto either for a visit or for the establishment of residence.

b. Travel During Course of Work. Should the Contractor require the Employee to travel at his expense after arrival at destination for work assignment and prior to proceeding to return destination, the Employee will be reimbursed for the transportation and will be allowed for such travel Six Dollars (&6.00) per day in lieu of all other subsistence expenses including the subsistence amount included in gross compensation.

c. Mode of Travel. All travel to and from destination for work assignment and to return destination and all travel in connection with the employment shall be by such method (air, rail, automobile, or water), schedule, and route, as the Contractor may designate. The Employee releases the Contractor from all liability, if any, for loss or injury to person or property sustained during travel while being transported by the Contractor under this Agreement, or by any carrier or other means of transportation notwithstanding that the Contractor may have directed the Employee so to travel, except as to such loss or injury which is

compensated by insurance maintained by the Contractor in accordance with the provisions of this Agreement.

d. Receipts for Expenses. The Employee will be reimbursed for expenses under this Article only upon the condition that the Employee submits promptly itemized reports properly supported by such written evidence of payment as the Contractor may require. When the initial point of travel departure is within the continental limits of the United States the Contractor will ordinarily prepay the [11] costs of transportation, berth and excess baggage to the port of embarkation but, if this is impractical, the employee will be reimbursed for such costs upon presentation of proper receipts therefor. During such travel in the continental United States an allowance of $3.00 per day will be made in lieu of reimbursement for all expenses for meals and all other incidental costs included above. During any necessary lay-over at the port of embarkation and during any subsequent travel, board and lodging will be furnished the Employee. If any employee is required to furnish his own board and lodging during travel in Alaska the above $3.00 per diem will be increased to $6.00.

Article 5. Conditions.

This Agreement is conditioned upon the occurrence of the following within ten days of the date hereof: (1) the Employee's securing all necessary permits and papers required for his departure from the United States and his travel to, and entry into the country of the destination for work

assignment. Expenses incurred by the Employee in obtaining such permits and papers, etc., shall be reimbursed by the Contractor upon receipt of properly itemized expense reports properly supported by such evidence of payment as the Contractor may require; (2), the Employee's securing, if he is subject to the Selective Service Act, such permit as shall be necessary to authorize him to depart from the United States; (3), the Employee's submitting to such physical examination and receiving such vaccination or immunization treatments as the Contractor may require; and (4), the Employee's having undergone prior to his departure such dental or medical treatments by an approved doctor or dentist as may have been prescribed upon the Employee's physical examination. The expense of such examinations and inoculation treatments as the Contractor shall require shall be borne by the Contractor. The expense of any prescribed medical or dental treatment will be borne by the Employee. The Employee shall present a certificate from the dentist or doctor, as the case may be, stating the accomplishment of the required treatment or treatments. The Contractor may extend the time for the accomplishment of the foregoing conditions if it so desires.

Article 6. Departure Time.

The Contractor will extend its best effort to obtain passage for the Employee out of the United States to the destination for work assignment at the earliest time practicable after the date hereof, having due regard to the time allowed under Ar-

ticle 5 for the performance of the conditions herein stipulated. If the Employee is not ready, able, and willing to depart or does not present himself for departure at the designated time and place, the employment shall terminated and the Contractor shall not reimburse Employee for any expenses incurred by the Employee otherwise reimbursable hereunder. The Employee, in such case, shall be liable for the amount of any advance made by the Contractor and the amount of any other expenses incurred by the Contractor in connection with the employment. In the event that the Contractor fails to obtain passage for the departure of Employee within four weeks after the Employee has advised the Contractor that the foregoing conditions to his departure are performed, he may notify the Contractor in writing that unless such provision is made for his departure within a number of days to be stated by the Employee (but not less than three days), the employment will terminate. Upon such written notice and failure to comply therewith on the part of the Contractor this Agreement shall terminate automatically. In such event, however, the Contractor shall reimburse the Employee the reasonable expenditures made by the Employee in performing the conditions specified as (1), (2), and (3) in Article 5 hereof, and such reimbursements shall be the full extent of the Contractor's liability to the Employee.

Article 7. Vacation Leave.

The Employee shall accrue leave with pay at the rate of two and one-half days per month for each

completed month of service in lieu of all other vacation allowances which leave may, at the discretion of the Contractor, be granted during the course of the employment or at the completion thereof. The termination of this Agreement for cause will be deemed to effect a forfeiture of all accrued leave.

Article 8. Prosecution of Work.

a. The Employee hereby agrees to work at such time or place, on such days and for such periods of time as the Contractor may require or direct. Base compensation, as set forth in paragraph a of Article 2, is established on the basis of a minimum work week of 48 hours and, for purposes of calculating overtime, the straight time hourly rate shall be the weekly base compensation divided by 48.

b. Non-manual employees will be divided into the following groups determined by their weekly base compensation: (1) Group "A" whose salaries are less than $50 per week, except those included in Group "D"; (2) Group "B" whose salaries are from $50 to $90 per week inclusive, except those included in Group "D"; (3) Group "C" whose salaries are in excess of $90 per week, except those included in Group "D"; (4) Group "D" whose salaries are not customarily related to the number of hours worked per day or the number of days worked in a week.

c. Group "A" employees will be paid at the straight time hourly rate for all authorized work performed in excess of 48 hours during the first six days worked in any regularly work week, and

at two times the straight time hourly rate for all authorized work performed on the seventh consecutive day the Employee works in any regularly established work week.

d. Group "B" employees will be expected to work any reasonable number of hours during the first six days worked in the regularly established work week without payment other than the base compensation. They will be paid at two times the straight time hourly rate for all authorized work performed on the seventh consecutive day the Employee works in any regularly established work week.

e. Group "C" employees will be considered supervisory or executive employees and will be expected to work any necessary number of hours (including the seventh day) without payment other than the base compensation.

f. The number of hours which shall constitute a work week for Group "D" employees shall be determined by the contractor with the approval of the Contracting Officer and base compensation for such employees shall be fixed accordingly. If Group "D" employees are required to work in excess of the number of hours so determined the Employee will not be paid additional compensation but will be granted compensatory time off with pay; provided however that, if unforeseen contingencies require that seven consecutive days be worked by the Employee in any regularly established work week, two times the straight time hourly rate shall be paid for authorized work performed on such sev-

enth consecutive day. For this purpose the straight time hourly rate shall be the base compensation divided by the number of hours in the work week as determined above.

g. No deduction from base compensation of employees in Groups "A," "B," "C," and "D" shall be made for approved absence on the holidays listed below but employees in Groups "A," "B," and "D" who are required to work on such holidays shall be paid at the rate of one and one-half times the straight hourly rate for work so performed. Such holidays are New Years Day, July Fourth, Labor Day, Thanksgiving Day, Christmas Day and Memorial Day or one other such holiday of greater local importance.

Article 9. Compensation for Death, Disability, Capture or Detention.

For the purpose of paying workmen's compensation benefits hereunder the Contractor shall provide benefits as prescribed in the United States Longshoremen's and Harbor Workers' Compensation Act, approved 4 March, 1927 (44 Stat. 1424) as amended and as extended by the Act of 16 August, 1941 (Public Law No. 208, 77th Cong.) as amended, and as extended by the Act of 2 December, 1942 (Public Law No. 784, 77th Cong.). The employees requests that payments under this section shall be paid to Johanna McNally (wife) at 70-33 64th Place, Glendale, L. I. New York.

Article 10. Return of Employee's Remains.

In the event of death of the Employee while at destination for work assignment or in transit thereto or therefrom, the Contractor shall, if transportation facilities are available and in the absence of any law or regulation by any competent Governmental authority, prohibiting the same, at its expense prepare and transport the remains of the Employee to the place designated in Article 4 or to such other point of equivalent or less distance as his spouse or next of kin may elect subject to the approval of the Contractor.

Article 11. Disputes.

Except as otherwise specifically provided in this Agreement all disputes arising hereunder or in relation to this contract between the Contractor and the Employee shall be decided by the Contracting Officer who executed the Government contract under which the Contractor is acting, or his duly authorized successor, representative or representatives, whose decision shall be final and conclusive upon the parties hereto.

Article 12. Notice of Claim.

The Employee agrees that he will, within thirty days after any claim arises, give a written notice to the Contractor setting forth in detail the nature of any debt, claim, charge, or cause of action growing out of or in any way relating to this contract or to the employment herein provided for; that he will file a written proof of claim with the Contractor within thirty days after the lapse of the

aforesaid thirty day period and that he will not institute any suit or action against the Contractor in any court or tribunal in any jurisdiction for any debt, claim, charge, or cause of action prior to a date six months subsequent to the filing by the Employee with the Contractor of such a written and sworn proof of claim, nor later than two years after the claim arises. Such action or suit, if and when instituted, shall not include any claim for damages for reason of any debt, claim, charge, or cause of action not specifically mentioned in the aforesaid proof of claim. It is agreed by the Employee that proof of his violation of any provision of this Article shall be valid and complete defense by the Contractor to any proceeding instituted to contravention of the provisions hereof.

Article 13. Interpretation of Agreement.

This agreement shall be construed and interpreted solely in accordance with the laws of the United States of America. The employee specifically agrees that, at the direction of or with the approval of the Contracting Officer, this agreement may be assigned to the United States, to any of its agencies, or its contractors in the Alaskan Area. This agreement constitutes the entire agreement between the parties hereto relative to the subject matter hereof and no promises or representations on the part of the contractor other than those expressly stated above have been made.

In Witness Whereof, the parties hereto have signed this Agreement the day and year first above

written. Receipt of duplicate by the Employee is hereby acknowledged.

S. Birch & Sons Construction Co. and Morrison-Knudsen Company, Inc.

/s/ W. E. DOUGHERTY,
Office Manager.

/s/ OWEN J. McNALLY,
Employee.

[Marginal Note]: It is further agreed that this Contract expires May 25, 1945, and supersedes in entirety the Contract dated May 25, 1944 by and between these same parties.

/s/ W.E.D.,
B-M-K.

/s/ OWEN J. McNALLY,
Employee. [12]

EXHIBIT "B"

Cost-Plus-A-Fixed-Fee

UNIFORM AGREEMENT OF EMPLOYMENT

For Work on U. S. Government Projects in The Alaskan War Manpower Area

Applying to Non-Manual Employees of Fixed Fee Contractors Employed for Work in the Territory of Alaska.

Non-Manual

This Agreement, made this 17th day of April, 1945, by and between S. Birch & Sons Construction Company and Morrison-Knudsen Company,

Inc., of Seattle, State of Washington, hereinafter called the "Employer," and Owen Joseph McNally of New York, State of New York, hereinafter called the "Employee."

Witness That the parties hereto have and do hereby agree as follows:

Article 1. Assignment of Work.

As a condition of obtaining and continuing employment the Employee warrants that all the statements made in his application are true to the best of his knowledge and belief. The Employee hereby certifies that he does not advocate, and is not a member of any organization that advocates the overthrow of the Government of the United States by force or violence.

The Employee's initial classification or designation shall be Clerk. The Employee's initial assignment is to work in that capacity at Alaskan Area. However, the Employee agrees to work, in that or any other designated capacity, to the full extent of his ability, at such time or place, or such days and for such periods as the Employer may require or direct.

Article 2. Compensation.

a. The Employee is to receive compensation at the base pay rate of $75.00 per six day week, payable by check or currency as the Employer may desire. Unless otherwise directed by the Employee in writing, subject to the approval of the Employer, all compensation payments shall be made at the site of the work.

b. When the Employee is in travel status com-

pensation shall accrue in accordance with the following provisions:

(1) In the case of the new Employee travel compensation shall commence on the day he departs from point of hire after having complied with the requirements of Article 5.

(2) In the case of Employees transferred directly to this contract from another War or Navy Department contract travel compensation shall commence on the day of departure for the place of work assignment.

(3) Travel compensation shall continue from the date of commencement until arrival at the place of work assignment except during delays or interruptions in travel resulting from negligence of the Employee.

(4) Travel compensation shall accrue during any time occupied in travel between places of work assignment.

(5) Travel compensation shall accrue during travel provided the Employee has satisfactorily discharged his obligations under this Agreement.

(6) Travel compensation shall accrue at the weekly base pay rate for the days of Sunday through Friday with no overtime allowance. Any portion of a day after 6:00 a.m. and before 6:00 p.m. spent in travel at the beginning or end of a journey shall be considered a full day

for the purpose of computing accrued travel compensation but travel before 6:00 a.m. or after 6:00 p.m. shall not be counted. No overtime will be allowed when in travel status except that, when the Employee is required to work under the provisions of paragraph d of this Article, pay will be based on the work actually performed. Travel status is to be considered entirely apart and distinct from work status and travel time shall not constitute days worked except that days spent in travel between places of work assignment shall be considered as time worked for the purpose of computing premium pay for work actually performed on the seventh day of the work week.

c. When the Employee is in work status at any place of work assignment compensation shall accrue in accordance with the following provisions:

(1) The base pay rate is to be full compensation for work performed during the first six days worked in the regularly established work week. For purposes of calculating overtime the straight time hourly rate shall be the weekly base pay rate divided by 48 and the straight time daily rate shall be the weekly base pay rate divided by 6.

(2) Non-Manual employees shall be divided into groups, according to the amount of

the base pay rate as follows: Group A paid not in excess of $50.00, Group B paid more than $50.00 but not in excess of $90.00, Group C paid in excess of $90.00.

(3) For all authorized work performed in excess of forty-eight hours during the first six days of the regularly established work week, Group A shall be paid the straight time hourly rate.

(4) Group B Employees will be expected to work any reasonable numbers of hours six days per week without payment of additional compensation.

(5) For all authorized work performed on the seventh consecutive day the Employee works in the regularly established work week Group A and Group B shall be paid two times the straight time hourly rate.

(6) Group A and Group B shall be paid one and one-half times the straight time daily rate for authorized work performed on any of the following holidays although no penalty will be applied to the weekly base pay rate for absence on any such holiday unless the Employee has been directed to work: New Year's Day, July Fourth, Labor Day, Thanksgiving, Christmas Day and Memorial Day or one other such holiday of greater local importance. However no such holiday premiums shall effect multiplication of other overtime premiums.

(7) Group C employees are expected to work any number of hours through the work week, including the seventh day, necessary to accomplish their task but will be paid no overtime.

d. Compensation shall be subject to deduction for Subsistence, Return Transportation Fund, for Social Security Tax, Alaska School Tax, and other deductions required by law, if applicable, and to such deductions as may be provided for by regulations of the Secretary of Labor in the interest of the Employee and of the work. If the Employee is in travel status and, at some intermediate point, involuntary layover is necessitated by lack of transportation, he will be expected to perform any work assigned to him by the Employer which reasonably conforms to the designation for which he is employed. Sometimes it is necessary that passengers supplement the culinary staffs on boats used for transportation of Employees and, in such cases, the Employee will be required to do his share.

e. If the Employee is not qualified to perform the work stipulated in Article 1, the parties hereto may agree upon his reassignment to a designation for which he is qualified, in which event the Employee is to be paid the base pay rate applicable to the reassignment and this Agreement will be modified in writing accordingly. If, under such conditions, the Employee refuses reassignment to a designation for which he is qualified such refusal shall forfeit his right to return travel compensation, transportation and travel expenses.

f. In the event that the Employee fails to re-

port for duty and render service the base pay rate shall be reduced accordingly unless the absence is authorized as chargeable to earned leave. In all cases leave must be requested in advance and approved in writing before it will be recognized as authorized absence.

g. The Employee shall accrue leave with pay at the rate of two and one-half days per month for each completed month of service which shall be the total allowance for sick leave and vacation leave. Such leave may, at the discretion of the Employer, subject to the approval of Contracting Officer, be granted during the course of employment or at the completion thereof. Employees who fail to complete the term of employment specified in Article 3 or who are separated because of their own misconduct (including such cases as insubordination, drunkeness on the job, theft, etc.) shall forfeit any leave which they may have accrued at the time of separation.

h. The Employer is obligated by this Agreement to provide the Employee with return transportation only upon satisfactory completion of the terms of employment as set forth in paragraph a, Article 3 hereof, or upon termination due to physical incapacity or induction orders as provided in paragraph b, Article 3 hereof. If the Employee quits before satisfactory completion, is discharged for cause or refuses re-assignment, as provided in paragraph e above, the Employer's responsibility ceases. In order to prevent hardship to the Employee in such an event, and insure his return, the Employee agrees to deposit with the Employer 25

per cent of each compensation payment earned after arrival at the place of work assignment until his "Return Transportation Fund" totals One Hundred and Fifty ($150.00) Dollars, and hereby appoints the Employer as his special representative and agent for the purpose of making such deposits. Upon satisfactory completion of the term of employment under this Agreement all of such fund shall be returned to the Employee in the final compensation payment. If this Agreement is assigned to any other employer in the Alaskan Area the "Return Transportation Fund" will be turned over to the new Employer for deposit as above. In the event, and only in the event, that the term of employment under this Agreement is not satisfactorily completed the fund thus created shall be used for the purpose of paying the transportation and travel expenses of the Employee to the port of re-entry into the Continental Limits of the United States, or to point of hire if within Alaska, and any unexpended balance not used for that purpose shall be promptly returned to the Employee, provided, however, that the Employer's obligation to return the Employee to the port of re-entry, or the point of hire if within Alaska, shall not extend to any expenditures beyond the amount that the Employee has deposited in the "Return Transportation Fund."

Article 3. Term of Employment.

a. The Employee agrees to be employed under this Agreement for a period commencing on the date hereof and ending upon termination of the employment by the Employer or the Employee, all

in accordance with the terms and conditions of this Agreement. If termination is desired by the Employee after six month's employment, excluding furlough time, the Employee may terminate the employment by giving the Employer a written notice specifying the termination date, which effective date shall not be less than fifteen days after the date of the notice nor less than six full calendar months after the date of this Agreement. The employer may without cause terminate the employment at any time after the date hereof by giving the Employee a written notice specifying the termination date. Upon such notification by either the Employee or the Employer, the Employee shall continue to work until the effective date of the termination and/or until the first available return transportation thereafter. [13]

b. The Employer may, for cause, terminate the employment instanter by delivering a notice in writing to the employee specifying the date of termination. In the event of such termination for cause, no compensation and no transportation or travel expenses shall be paid beyond the termination date or the last day worked, whichever shall be the earlier. Termination by the Employer for cause shall be when the employment is terminated for reason of any fault or dereliction of duty by the Employee which causes shall include but not be limited to: (1) insubordination; (2) venereal disease incapacitating him for the performance of his work; (3) inordinate use of intoxicating liquors or drugs incapacitating him for the performance

of his work; (4) other acts of misconduct. The Agreement shall not be deemed to have been terminated for cause (1) in the event the employment is terminated for reason of the Employee's inability regularly to perform his duties due to illness or physical incapacity not due to the Employee's own fault and certified by a qualified medical doctor designated or approved by the Employer; or (2) in the event that the Employee terminates the employment voluntarily after six months' employment, excluding furlough time, and after having given the notice required in paragraph a of this Article, or (3) in the event that the Employee is officially required to resign his employment for induction into the Armed Forces of the United States.

Article 4. Transportation and Travel Expenses.

a. Transportation and travel expenses to and from destination for work assignment. The Employer shall, at his election, either furnish or reimburse the Employee for the actual, reasonable and necessary transportation and travel expenses of the Employee in traveling from New York, New York to the place of the work assignment and, upon satisfactory completion of this contract, in traveling to return destination at the termination of employment. The return destination shall be Employee's initial point of hire as indicated in the introductory paragraph of this Agreement or such other point of equal or less travel time, distance, and cost as the Employee may select, subject to the approval of the Employer. Such transporta-

tion expenses shall include actual, reasonable and necessary expense in transporting personal luggage and other property of the Employee consisting of personal clothing, tools, and necessary effects, such as toilet articles. The Employer will not bear the expense of transporting household goods or the dependents of the Employee, and it is expressly understood and agreed that, due to the war emergency and conditions created thereby, none of the Employee's family shall accompany the Employee to the destination for work assignment or go thereto either to visit or for the purpose of establishing a residence. In the event of termination for cause the Employer shall furnish transportation and necessary travel expenses to return the Employee to a port of re-entry into the Continental Limits of the United States, or to point of hire if within Alaska, to the extent permitted by the amount of the Return Transportation Fund created by the Employee as outlined in Article 2, paragraph h. In such a case the Employee hereby waives all rights to the moneys in said Return Transportation Fund used by the Employer for the purpose of defraying the expenses of transportation and travel expenses to the port of re-entry, or to point of hire if within Alaska, but any unexpended balance not used for that purpose shall be returned to the Employee.

b. Travel During Course of Work. Should the Employer require the Employee to travel at his own expense after arrival at destination for work assignment and prior to proceeding to return des-

tination, the Employee will be reimbursed for the costs of transportation and will be allowed during such travel Six Dollars ($6.00) per day for subsistence and lodging when utilizing commercial facilities.

c. Mode of Travel. All travel to destination for work assignment and to return destination and all travel in connection with the employment shall be by such method (air, rail ,automobile, or water), schedule, and route, as the Employer may designate. The Employee releases the Employer from all liability, if any, for loss or injury to person or property sustained during travel while being transported by the Employer under this Agreement, or by any carrier or other means of transportation notwithstanding that the Employer may have directed the Employee so to travel, except as to such loss or injury which is compensated by insurance maintained by the Employer in accordance with the provisions of this Agreement.

d. Receipts for Expenses. The Employee will be reimbursed for expenses under this Article only upon the condition that Employee promptly submits itemized reports properly supported by such written evidence of payment as the Employer may require. When the initial point of travel departure is within the Continental Limits of the United States, the Employer will ordinarily prepay the cost of transportation and excess baggage to the port of embarkation; but if this is impracticable, the Employee will be reimbursed for such cost upon presentation of receipts therefor. During such

travel within the Continental Limits of the United States, an allowance of Three Dollars ($3.00) per day will be made in lieu of reimbursement for actual expenses for meals and other incidental costs not included in the above. During any necessary layover at the port of embarkation, and during any subsequent travel, board and lodging ordinarily will be furnished by the Employer. Should the Employee be required to travel at his own expense within Alaska, allowances will be in accordance with paragraph b of this Article. No receipts are required for items covered by per diem allowance.

Article 5. Conditions.

a. This Agreement shall not become valid and operative until the Employee has complied with the following requirements, to which he hereby agrees: (1) presentation of a valid Certificate of Availability; (2) presentation of satisfactory evidence of citizenship; (3) submission to physical examination, vaccination or immunization treatments as are required; (4) completion, prior to his departure, of such dental or medical treatments by an approved doctor or dentist as may have been prescribed upon the Employee's Physical Examination. The expense of such examination and innoculation treatments as the Employer shall require shall be borne by the Employer. The expense of any prescribed medical or dental treatment will be borne by the Employee. The Employee shall present a certificate from the dentist or doctor, as the case may be stating the accomplishment of the required treatment or treatments; and (5) the Em-

ployee's securing, if he is subject to the Selective Service Act, such permit as shall be necessary to authorize him to depart from the United States. Note: It shall be definitely understood that final physical examination and clearance will be performed by Government doctors at the port of embarkation before departure from the States so no information should be withheld during preliminary examination at point of hire.

b. In the event that the Employee has not complied with the foregoing requirements within a period of 10* days from the date of initial interview the Employee must reinstate his application for further consideration.

Article 6. Departure Time.

The Employer will extend his best efforts to obtain transportation for the Employee to the Place of work assignment at the earliest time practicable after compliance with the conditions of Article 5. If the Employee is not ready, able and willing to depart from his point of hire or does not present himself for departure at the designated time and place, the employment shall terminate and the Employer shall not reimburse the Employee for any expenses incurred by the Employee otherwise reimbursable hereunder. The Employee in such case, shall be liable for the amount of any advance made by the Employer and the amount of any other expenses incurred by the Employer in connection with the employment except for work actually performed under the provisions of Article 2, paragraph d. It is expressly understood that travel

compensation is not payment of wages for services rendered but is allowed the Employee to avoid hardship which might otherwise result from lack of income during the period required to reach a distant place of work assignment. This allowance is made contingent upon the Employee's arrival at the place of work assignment and any payments made enroute constitute advances for which the Employee is liable if he fails to reach the job due to fault or negligence on his part.

Article 7. Subsistence.

Employees shall be furnished subsistence and quarters at the job site at a charge not to exceed One Dollar and Fifty Cents ($1.50) per day.

Article 8. Compensation for Death, Disability, Capture or Detention.

For the purpose of paying workmen's compensation benefits hereunder, the Employer shall provide benefits as prescribed in the United States Longshoremen's and Harbor Workers' Compensation Act, approved 4 March 1927 (44 Stat. 1424) as amended and as extended by the Act of 16 August 1941 (Public Law No. 208, 77th Cong.) as amended and as extended by the Act of 2 December 1942 (Public Law No. 784, 77th Cong.).

Article 9. Disputes.

Except as otherwise specifically provided in this Agreement all disputes arising hereunder, or in relation to this Agreement, between the Employer and the Employee shall be decided by the Contracting Officer who executed the Government contract under which the Employer is acting, or his duly

authorized successor or representative, whose decision shall be final and conclusive upon the parties hereto.

Article 10. Notice of Claim.

The Employee agrees that he will, within thirty days after any claim arises, give a written notice to the Employer setting forth in detail the nature of any debt, claim, charge, or cause of action growing out of or in any way relating to this Agreement or to the employment herein provided for, that he will file a written proof of claim with the Employer within thirty days after the lapse of the aforesaid thirty day period; and that he will not institute any suit or action against the Employer in any court or tribunal in any jurisdiction for any debt, claim, charge, or cause of action prior to a date six months subsequent to the filing by the Employee with the Employeer of such a written and sworn proof of claim, not later than two years after the claim arises. Such action, or suit, if and when instituted, shall not include any claim for damages for reason of any debt, claim, charge, or cause of action not specifically mentioned in the aforesaid proof of claim. It is agreed by the Employee that proof of his violation of any provision of this Article shall be valid and complete defense by the Employer to any proceeding instituted in contravention of the provisions hereof.

Article 11. Interpretation of Agreement.

This agreement shall be construed and interpreted solely in accordance with the laws of the United States of America. The Employee speci-

fically agrees that, at the direction of or with the approval of the Contracting Officer, this Agreement may be assigned to the United States or to any other Employer engaged in War Department construction work in the Alaskan Area. In case of assignment to the United States the provisions of Article 2 will be modified to the extent required to conform to the laws and regulations governing compensation and leave benefits of Government Employees. This Agreement constitutes the entire agreement between the parties hereto relative to the subject matter hereof and no promises or representations on the part of the Employer other than those expressly stated above have been made.

In Witness Whereof, the Parties hereto have signed this Agreement the day and year first above written. Receipt of duplicate by the Employee is hereby acknowledged.

S. Birch & Sons Construction Co. and Morrison-Knudsen Company, Inc.
Employer.

By /s/ C. G. WEBER,
Assistant Personnel Manager.

/s/ OWEN J. McNALLY,
Employee. [14]

*Not to exceed thirty days.

[Endorsed]: Filed Oct. 10, 1946.

[Title of District Court and Cause.]

SUPPLEMENTAL ANSWER AND AFFIRMATIVE DEFENSES

Come now the defendants herein and by way of Supplemental Answer and Affirmative Defenses to the Complaint of the plaintiff herein, pursuant to leave granted by Order of this Court, dated the 16th day of June, 1947, plead and allege:

V.

That all contracts of employment between the plaintiff and these answering defendants, and all wages and salaries paid thereunder were approved and paid in good faith by defendants in conformity with and in reliance upon an administrative regulation, order, ruling, approval or interpretation of an agency of the United States, to-wit, the United States War Department and the War Department Wage Administration Agency, and that all such contracts, wages and salaries were in conformity with the administrative practice and enforcement policy of such United States War Department and War Department Wage Administration Agency with respect to the class of employers to which defendants belonged.

VI.

That any act or omission of defendants under [15] the Fair Labor Standards Act of 1938, as amended, giving rise to any cause of action to plaintiff herein, was in good faith and in the reasonable belief on the part of the defendants that

any such act or omission was not a violation of said Fair Labor Standards Act of 1938, as amended.

Wherefore, the defendants pray that the Complaint of the plaintiff herein be dismissed with prejudice, and that defendants may have and recover their costs and disbursements to be taxed herein.

ALLEN, HILEN, FROUDE & DeGARMO.

By /s/ GERALD DeGARMO,

Attorneys for Defendants.

(Acknowledgment of Service.)

[Endorsed]: Filed June 18, 1947. [16]

[Title of District Court and Cause.]

PLEADING OF THE UNITED STATES IN INTERVENTION

The United States of America, intervenor herein, for its pleading in intervention says:

1. That intervenor is not required to answer the factual allegations of the parties to this action and, therefore, neither admits nor denies such allegations.

2. That the Portal-to-Portal Act of 1947, approved May 14, 1947, conforms in all respects to the provisions and requirements of the Constitution of the United States and is an existing and valid law of the United States.

3. That the constitutionality of the said Portal-to-Portal Act of 1947 is not subject to serious

question but if the Court should entertain serious doubts concerning the constitutionality of that Act, it should first consider the defenses raised by the defendants which are not based upon the Portal-to-Portal Act of 1947, and, if it finds that any such defense or defenses bar all the claims herein, it should dismiss the action without ruling on the constitutional question.

Wherefore, the United States of America prays that the Court enter a judgment herein which shall be consistent with the constitutional validity of the said Portal-to-Portal Act of 1947. [17]

TOM C. CLARK,
Attorney General.
By /s/ HERBERT A. BERGSON,
Acting Assistant
Attorney General.
/s/ J. CHARLES DENNIS,
United States Attorney.
/s/ FRANK PELLEGRINI,
Assistant United States
Attorney.

Of Counsel:

ENOCH E. ELLISON,
Special Assistant to the
Attorney General.
JOHANNA M. D'AMICO,
Attorney, Department of
Justice.

(Acknowledgment of Service.)

[Endorsed]: Filed Dec. 29, 1947. [18]

[Title of District Court and Cause.]

STIPULATION CONCERNING RECORD ON APPEAL

It is hereby stipulated between the above named parties, by their respective attorneys of record, as follows:

That the Stipulation and Pre-Trial Order Re Portal Act Hearing and the reporter's transcript of evidence and exhibits, heretofore transmitted to the Circuit Court of Appeals for the Ninth Circuit in Tyler vs. S. Birch and Sons Construction Company, a corporation, et al, Number 1293, may be the Stipulation and Pre-Trial Order Re Portal Act Hearing and the reporter's transcript of evidence and exhibits in this cause, and in lieu thereof, a copy of the within stipulation and order shall be transmitted to the said Circuit Court of Appeals.

Dated at Seattle, Washington this 30th day of July, 1948.

OSCAR A. ZABEL and
FREDERICK PAUL.
By FREDERICK PAUL,
Attorneys for Plaintiff.

ALLEN, HILEN, FROUDE &
DeGARMO,
By GERALD DeGARMO,
Attorneys for Defendant.

J. CHARLES DENNIS &
FRANK PELLEGRINI.

By FRANK PELLEGRINI,
Attorneys for the United States of America.

It is so ordered this 5th day of August, 1948.

JOHN C. BOWEN,
United States District Judge.

[Endorsed]: Filed Aug. 5, 1948. [19]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having heretofore come on regularly for trial before the undersigned, one of the Judges of the above entitled Court, upon the Complaint of the plaintiff and the Answer and Affirmative Defenses of the defendants; and the plaintiff having appeared by his Attorneys, Oscar A. Zabel and Frederick Paul, and the defendants having appeared by their representative and having been represented by their Attorneys, Allen, Hilen, Froude & DeGarmo; and evidence having been introduced on behalf of plaintiff and defendants, and the Court having heard and considered the evidence, the argument of counsel and the briefs submitted on behalf of plaintiff, defendants, and the United States of America, appearing as intervenor, and having heretofore orally announced its decision herein, now makes the following:

FINDINGS OF FACT

I.

That plaintiff brought this action pursuant to the provisions of Section 16 (b) of the Fair Labor Standards Act of 1938, as Amended, to recover overtime compensation and an equal amount as liquidated damages, [20] and a reasonable attorneys' fee, and that jurisdiction is conferred on this Court by Section 14 (8), Title 28, United States Code.

II.

That the defendant, S. Birch & Sons Construction Company, is a Montana corporation, doing business under said name and style; and the defendant, Morrison-Knudsen Company, Inc., is a Delaware corporation; and that both of said defendants were qualified to do, and were doing, business in the State of Washington during the times hereinafter mentioned, jointly maintaining an office in Seattle, Washington.

III.

That the said defendants were joint venturers and had Cost-Plus-A-Fixed-Fee Contracts, Numbers W45-108-eng-501, W45-108-eng-1360, and W45-108-eng-1499 with the United States of America, for the construction of military installations in the Territory of Alaska.

IV.

That the plaintiff was first employed by defendants as a non-manual worker, under a written Contract of Employment, Plaintiff's Exhibit 6, on September 24, 1944, at Adak, Alaska, in connection

with the performance of Contract No. W45-108-eng-501 as a "Storekeeper", at a "base compensation" rate of $70.00 per week, and worked at said position and rate until December 24, 1944, when he was reclassified to a "base compensation" rate of [21] $75.00 per week, at which rate he continued his work until February 10, 1945.

That plaintiff was subsequently re-employed by defendants for work at Cold Bay, Alaska, under Contract No. W45-108-eng-1360, on April 17, 1945, under a written Contract of Employment, Plaintiff's Exhibit 7, as a "Clerk", at a "base pay rate of $75.00 for 6-day week", at which position and rate of pay he worked until July 14, 1945, at which time he was transferred to Attu, Alaska, to work for defendants, under Contract No. W45-108-eng-1499, as a "Storekeeper", under contract, Plaintiff's Exhibit 7, but at a reclassified "base pay rate of $80.00 for 6-day week", under which classification and pay rate the plaintiff worked until November 10, 1945.

V.

That while employed by defendants under the said written contract, and at the "base compensation rate of $70.00 per week", the plaintiff worked ninety-six (96) hours in excess of forty (40) hours per work-week, for which he was paid only straight time, one hundred fifty-six (156) hours in excess of forty (40) hours per work-week, for which he was paid no overtime, and one hundred thirty (130) hours in excess of forty (40) hours per work-week upon the seventh day of the work-week, for which he was paid double-time.

That while employed by defendants under the said written contract, and at the "base compensation rate of $75.00 for 6-day week", the plaintiff worked one hundred four (104) hours in excess of forty (40) hours per work-week, for which he was paid only straight time, one hundred eighty-eight (188) hours in excess of forty (40) hours per work-week, for which he was paid no overtime, and one [22] hundred seventy-four (174) hours in excess of forty (40) hours per work-week upon the seventh day of the work-week, for which he was paid double-time.

That while employed by defendants under the said contract, and at the "base pay rate of $80.00 for 6-day week", the plaintiff worked eighty (80) hours in excess of forty (40) hours per work-week, for which he was paid only straight time, one hundred thirty-four (134) hours in excess of forty (40) hours per work-week, for which he was paid no overtime, and one hundred twenty (120) hours in excess of forty (40) hours per work-week upon the seventh day of the work-week, for which he was paid double-time.

That the "regular rate" of pay of the plaintiff under the Contracts of Employment with the defendants, heretofore mentioned, was as follows for the several rates of pay:

$70.00 per week divided by 48 equals $1.4583 per hour

$75.00 per week divided by 48 equals $1.5625 per hour

$80.00 per 6 day week divided by 48 equals $1.6666 per hour

VI.

That the duties of plaintiff at Adak consisted of writing equipment inspection reports, which was an inventory of trucks, cranes, bulldozers, scrapers and other construction equipment; of writing material requistions for replacement parts, materials and supplies; the said requisitions were shipped to Seattle and the merchandise ordered from the manufacturers and shipped to the jobsite on the basis of said requisitions; of typing correspondence for the Chief Storekeeper to the Seattle office of defendants, and to Project Managers at other jobsites in Alaska of defendants relating to shipment of supplies, reasons [23] for ordering such supplies, speed of transporting the same, and inquiries of arrival dates of said supplies; of typing letters for the Personnel Manager relating to personal baggage of employees, lost in transit from continental United States to the jobsite; of typing letters for the Personnel Manager relating to personal tools lost in transit from continental United States to the jobsite; of sending radiograms which ordered parts, materials and supplies from the Seattle office of defendants for emergency shipments, material requisitions being later forwarded by the plaintiff confirming the radiograms; of inventorying personal tools belonging to other employees of defendants; of writing affidavits of loss for other employees who lost tools assigned to them on the job; of typing lists of equipment parts, materials and supplies destined for defendants from the ship's manifests, which contained a list of the entire cargo

of a ship arriving at the jobsite from continental United States; of making up baggage manifests for the shipment of personal baggage belonging to defendants' employees enroute to continental United States; of working on the final report which was an accounting record of all equipment parts, materials and supplies; of typing equipment transfers which recorded the transfer equipment to other CPFF contractors from the defendants; that the plaintiff's duties as an employee of defendants were in interstate commerce.

That when plaintiff worked at Cold Bay, his duties were substantially similar to those performed at Adak, but in addition thereto he wrote receiving reports from packing lists attached to boxes and crates shipped from continental United States inventorying the identification number, quantity received, description of parts and discrepancies [24] of such lists with the purchase order originally ordering the goods purchased from manufacturers in continental United States.

That the plaintiff's duties as an employee of defendants were in interstate commerce.

That when the plaintiff worked at Attu for the defendants, his duties were substantially similar to those performed at Cold Bay, including the writing of receiving reports.

That the plaintiff's duties as an employee of defendants were in interstate commerce.

VII.

That all practices of the defendants, with respect to the payment of overtime compensation for all

hours worked by the plaintiff in excess of forty (40) hours in any one work-week, were in good faith, in conformity with and in reliance on Administrative regulations, orders, rulings, approvals and interpretations of the following agencies of the United States, to-wit, the United States War Department, the Corps of Engineers of the United States War Department, and the War Department Wage Administration Agency.

VIII.

That all practices of the defendants, with respect to the payment of overtime compensation for all hours worked by the plaintiff in excess of forty (40) hours in any one work-week, were in good faith, and that the defendants had reasonable grounds for believing that such practices were not a violation of the Fair Labor Standards Act of 1938, as amended.

Done in open court this 2nd day of March, 1948.

/s/ JOHN C. BOWEN,
District Judge.

From the foregoing Findings of Fact the Court hereby deduces the following:

CONCLUSIONS OF LAW

I.

That the plaintiff was, during all of the times hereinbefore and hereinafter mentioned, and for the number of overtime hours set forth in the foregoing Findings of Fact, engaged in interstate commerce.

II.

That the plaintiff was neither a bona fide executive nor administrative employee during his employment by defendants.

III.

That the Portal-to-Portal Act of 1947 is, and Sections 9 and 11 thereof are, constitutional.

IV.

That defendants are subject to no liability to the plaintiff for or on account of defendants' failure to pay overtime compensation under the Fair Labor Standards Act of 1938, as Amended.

V.

That the action of the plaintiff herein should be dismissed with prejudice, and with costs incurred subsequent to the filing of the Supplemental Answer in favor of the defendants, to be taxed in accordance with law and the rules of this Court.

Done in open court this 2nd day of March, 1948.

/s/ JOHN C. BOWEN,
District Judge.

Presented by

ALLEN, HILEN, FROUDE, & DeGARMO,

By /s/ GERALD DeGARMO,

[Endorsed]: Filed March 2, 1948. [25]

In the District Court of the United States for the Western District of Washington, Northern Division.

Civil Action—No. 1628

OWEN J. McNALLY,

Plaintiff,

vs.

S. BIRCH & SONS CONSTRUCTION COMPANY, a corporation, and MORRISON-KNUDSEN COMPANY, a corporation,

Defendants.

JUDGMENT

This cause having heretofore come on regularly for trial before the undersigned, one of the Judges of the above entitled Court, upon the Complaint of the plaintiff and the Answer and Affirmative Defenses of the defendants; and the plaintiff having appeared by his Attorneys, Oscar A. Zabel and Frederick Paul, and the defendants having appeared by their representative and having been represented by their Attorneys, Allen, Hilen, Froude & DeGarmo; and evidence having been introduced on behalf of plaintiff and defendants, and the Court having heard and considered the evidence, the argument of counsel and the briefs submitted on behalf of plaintiff, defendants, and the United States of America, appearing as intervenor, and having heretofore orally announced its decision herein, and having heretofore made and entered Findings of

Fact and Conclusions of Law; and the Court being fully advised:

Now, therefore, it is hereby ordered, adjudged and decreed that the action of the plaintiff herein be and the same is hereby dismissed, with prejudice and with costs incurred subsequent to the filing of the Supplemental Answer in favor of the defendants and against the plaintiff, to be taxed in the manner provided by law and by the rules of this Court.

Done in open court this 2nd day of March, 1948.

JOHN C. BOWEN,
District Judge.

Presented by

ALLEN, HILEN, FROUDE & DeGARMO,
By GERALD DeGARMO.

(Entered on Civil Docket Mar. 2, 1948.)

[Endorsed]: Filed March 2, 1948. [26]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: S. Birch & Sons Construction Co., a corporation, and Morrison-Knudsen Company, a corporation, defendants, and Allen, Hilen, Froude & America, intervener, and J. Charles Dennis and Frank Pellegrini, its attorneys:

Notice is hereby given that the above named plaintiff appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, and the whole thereof, involved in the above cause of action entered in the above named action on the 2nd day of March, 1948, and which is now final.

Dated at Seattle, Washington, this 27th day of April, 1948.

ZABEL, POTH & PAUL and
FREDERICK PAUL,

By FREDERICK PAUL,
Attorneys for Plaintiff.

[Endorsed]: Filed April 30, 1948. [27]

[Title of District Court and Cause.]

APPEAL BOND

Know All Men By These Presents:

That I, Owen J. McNally, the plaintiff above named, as principal of the National Surety Corporation, a corporation, organized under the laws of the State of New York, and authorized to transact business of surety in the State of Washington, as surety are held and firmly bound onto S. Birch & Sons Construction Co., a corporation, and Morrison-Knudsen Co., a corporation, the defendants named in the above entitled action, and United States of America, Intervenor, in the just and full sum of $250.00, for which sum well and true to be paid, we bind ourselves, our and each of our heirs, executors and administrators, successors and assigns, jointly and severally, firmly by these presents:

Sealed with our seals and dated this 14th day of July, 1948.

The condition of this obligation is such:

That, whereas, the above named defendants on the 2nd day of March, 1948, in the above entitled action and Court, recovered judgment against the plaintiff above named; and, [28]

Whereas, the above named principal has heretofore given due and proper notice that he appeals from said judgment of the above entitled Court to the Circuit Court of Appeals;

Now, therefore, if the said principal, Owen J. McNally. shall pay to S. Birch & Sons Construction Co., a corporation, and Morrison-Knudsen Co., a

corporation, and to United States of America, all costs and damages that may be awarded against said defendants and intervenor on the appeal, or on the dismissal thereof, not to exceed the sum of $250.00, and shall satisfy and perform the judgment or order appealed from, in case it shall be affirmed, and any judgment or order which the United States Circuit Court of Appeals, for the Ninth Circuit may render, or make, or order to be rendered, or made by the above entitled Court, then this obligation to be void; otherwise, to remain in full force and effect.

OWEN J. McNALLY,

By /s/ FREDERICK PAUL,
One of His Attorneys.

NATIONAL SURETY
CORPORATION,

(Seal) By /s/ MILDRED PALITZKE,
Attorney-in-Fact.

[Endorsed]: Filed July 15, 1948. [29]

United States Circuit Court of Appeals for the Ninth Circuit

No. 1628

OWEN J. McNALLY,

Plaintiff, Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a corporation, and MORRISON-KNUDSEN CO., a corporation,

Defendants, Appellees.

UNITED STATES OF AMERICA,

Intervenor.

STIPULATION AND ORDER EXTENDING TIME TO FILE AND DOCKET CAUSE

Whereas, in the above entitled case, the plaintiff has filed his notice of appeal to the above entitled court, and

Whereas, the record on appeal in said cause is and

Whereas, the order to the court reporter to transcribe the record was timely given; and

Whereas, the record has just been received and cannot be processed through the office of the Clerk of the United States District Court for the Western District of Washington, Northern Division, prior to the expiration of the time allowed by law to file and docket the same in the above entitled court. [30]

Now, therefore, it is hereby stipulated by and

between the above named parties through their respective attorneys that the time to file and docket the said cause may be extended to on or before August 15, 1948.

Dated at Seattle, Washington this 16th day of July, 1948.

ALLEN, HILEN, FROUDE
& DeGARMO,

By GERALD DeGARMO,
Attorneys for Appellees.

OSCAR A. ZABEL &
FREDERICK PAUL,

By FREDERICK PAUL,
Attorneys for Appellant.

It is so ordered this 19th day of July, 1948.

FRANCIS A. GARRECHT,
United States Circuit Judge.

A true copy. Attest: July 19, 1948. Paul P. O'Brien, Clerk. (Seal).

[Endorsed]: Filed July 19, 1948. Paul P. O'Brien, Clerk.

[Endorsed:] Filed July 21, 1948. Millard P. Thomas, Clerk. [31]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The plaintiff states that the points upon which he intends to rely upon appeal are the following:

1. The court erred in finding, concluding, and adjudging that all practices of the defendants, or any such practices, with respect to the payment of overtime compensation for all hours worked by the plaintiff in excess of forty (40) hours in any one work week were in good faith, in conformity with and in reliance on administrative regulations, orders, rulings, approvals and interpretations of the following agencies of the United States, to wit: The United States War Department, the Corps of Engineers of the United States War Department, and the War Department Wage Administrative Agency, or an agency of the United States.

2. The court erred in finding, concluding, and adjudging that all the practices of the defendants with respect to the payment of overtime compensation for all hours worked by the plaintiffs in excess of forty (40) hours in any one work week, or any such practices, were in good faith, or that the defendants had [32] reasonable grounds for believing that such practices were not a violation of the Fair Labor Standards Act of 1948, as amended.

3. The court erred in finding, concluding, and adjudging that the defendants relied in good faith, or at all, upon anything except the contract which

they had with the War Department of the United States.

4. The court erred in holding that Sections 9 and 11 of the Portal-to-Portal Pay Act of 1947 are constitutional.

Dated at Seattle this 12th day of July, 1948.

OSCAR A. ZABEL and
FREDERICK PAUL,

By /s/ FREDERICK PAUL,
Attorneys for Plaintiff.

(Acknowledgment of Service.)

[Endorsed]: Filed July 27, 1948. [33]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Plaintiff hereby designates the following portions of the record to be contained in the record on appeal in the above-entitled action:

1. Complaint
2. Answer
3. Supplemental Answer and Affirmative Defense
4. Pleading of the United States in Intervention
5. Stipulation Concerning Record on Appeal

6. Findings of Fact and Conclusions of Law
7. Judgment
8. Notice of Appeal
9. Cost Bond on Appeal
10. Order Granting Extension of Time to File Record and Docket Cause
11. Statement of Points on Appeal
12. This Designation

Dated at Seattle this 12th day of July, 1948.

OSCAR A. ZABEL &
FREDERICK PAUL,

By FREDERICK PAUL,
Attorneys for Plaintiff.

(Acknowledgment of Service.)

[Endorsed]: Filed July 27, 1948. [34]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS OF RECORD ON APPEAL

S. Birch & Sons Construction Company, a corporation, and Morrison-Knudsen Company, a corporation, defendants in the above entitled action and appellees, hereby designate the following additional portions of the record in the above entitled

case, to be contained in the Record on Appeal to the Circuit Court of Appeals for the Ninth Circuit:

(1) Stipulation and Pre-Trial Order Re Portal Act Hearing.

Dated at Seattle, Washington, this 20th day of July, 1948.

ALLEN, HILEN, FROUDE
& DeGARMO,

By /s/ GERALD DeGARMO,
Attorneys for Defendants
and Appellees.

(Acknowledgment of Service.)

[Endorsed]: Filed July 21, 1948. [35]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington. do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered 1 to 79, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above entitled cause as is required by designations of counsel filed and shown

herein, as the same remain of record and on file in the Office of the Clerk of said District Court at Seattle, and that the same constitute the record on appeal herein from the supplemental judgment of said United States District Court for the Western District of Washington filed and entered on March 2, 1948, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparing record on [80] appeal in the above entitled cause, to-wit:

Clerk's fees: 3 pages at 40c, $1.20; 77 pages at 10c, $7.70; Notice of Appeal, $5.00; total, $13.90.

I hereby certify that the above amount has been paid to me by the attorney for the appellant.

In witness whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 9th day of August, 1948.

(Seal) MILLARD P. THOMAS,
Clerk. [81]

[Endorsed: No. 12018. United States Court of Appeals for the Ninth Circuit. Owen J. McNally, Appellant, vs. S. Birch & Sons Construction Co., a corporation, Morrison-Knudsen Co., a corporation, and United States of America, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed August 11, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit

No. 12018

OWEN J. McNALLY,

Plaintiff, Appellant,

vs.

S. BIRCH & SONS CONSTRUCTION CO., a corporation, and MORRISON-KNUDSEN CO., a corporation,

Defendants, Appellees.

UNITED STATES OF AMERICA,

Intervenor.

ORDER

The above-entitled matter having come on duly and regularly for hearing before the undersigned Judges of the above-entitled Court upon motion of the appellants herein for an order that the stipulation concerning evidence and pre-trial order and the designated portions of the transcript of testimony may be printed in the case of Vernon O. Tyler vs. S. Birch & Sons Construction Company and Morrison-Knudsen, Inc., No. 11983 only, and incorporated by reference in the other four cases, and the Court having considered the said motion, the file and record herein, and the stipulation of all parties in support thereof,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the stipulation concerning evidence and pre-trial order and the designated portions of the transcript of the testimony shall be printed in the case of Vernon O. Tyler vs. S. Birch & Sons Construction Company and Morrison-Knudsen, Inc., No. 11983 only and in the remaining cases a copy of the stipulation in support of the said motion shall be printed in lieu of such portions and such portions of the record shall be incorporated therein by reference.

Dated this 29th day of July, 1948.

/s/ FRANCIS A. GARRECHT,
Judge.

[Endorsed]: Filed July 29, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

ORDER

This matter having come on duly and regularly for hearing before the undersigned Judges of the above-entitled Court upon motion of the above-named appellants for an order permitting all Exhibits in the above-entitled cases, consisting of three bound volumes of white background photostatic copies of various documents, to be considered in their original form by this Court and not be printed in the record, and the Court having considered the said motion,

the file and record herein, and the stipulation of all parties in support of said motion.

Now, Therefore, It is Hereby Ordered, Adjudged and Decreed that all exhibits in the above-entitled cases may be considered in their original form and not be printed in the record.

Dated this 29th day of July, 1948.

/s/ FRANCIS A. GARRECHT,
Judge.

[Endorsed]: Filed July 29, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

ADOPTION OF STATEMENT OF POINTS ON APPEAL

The above named appellant hereby adopts statement of points on appeal heretofore filed in the District Court in this cause.

/s/ FREDERICK PAUL,
Attorney for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed August 24, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF PORTION OF RECORD TO BE PRINTED

The above named appellant hereby designates the entire record heretofore transmitted to the Court in this action be printed together with this designation, adoption of statement of points on appeal, and a stipulation and order of record on appeal heretofore filed in the above entitled Court; except the appellant does not designate pre-trial order relating to the Portal hearing to be printed.

/s/ FREDERICK PAUL,
Attorney for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed August 24, 1948. Paul P. O'Brien, Clerk.